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No. 75-1728

In the

Supreme Court of the United States

OCTOBER TERM, 1975

C. CLYDE ATKINS, et al.,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

LOUIS C. BECHTLE, et al.,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

On Certificate From The United States Court Of Claims

PLAINTIFFS' BRIEF ON THE QUESTION OF DISQUALIFICATION

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PLAINTIFFS' BRIEF ON THE QUESTION OF DISQUALIFICATION

JURISDICTION

This cause is before this Court on the Certificate of the United States Court of Claims transmitted to this

Court on May 27, 1976.* It relates to two consolidated cases presently pending in the Court of Claims. Subsequently on June 3, 1976, this Court invited the parties to submit briefs on the question certified by the Court of Claims. Pursuant to that invitation, plaintiffs[1] have surveyed the relevant authorities, historical and current, and this memorandum reflects that survey.

THE QUESTION PRESENTED FOR REVIEW

The question certified by the Court of Claims is:

> In view of the express provisions of Pub. L. 93-512 and the resolutions of the Judicial Conference as set forth above, are the judges of the Court of Claims required to disqualify themselves in these cases, or does the "doctrine of necessity" authorize and require the judges of the Court of Claims to hear and decide these cases?

* The Certificate of the Court of Claims is included as an Appendix to this Brief.

[1] As noted in the Certificate, plaintiffs in these consolidated cases are 82 United States Circuit and District Judges. The parties plaintiff in *Atkins* v. *United States* (Ct. Cl. No. 41-76) are:

C. Clyde Atkins	Joseph S. Lord, III
William H. Becker	Malcolm M. Lucas
Lloyd H. Burke	William J. Lynch
Oliver J. Carter	Walter R. Mansfield
Fred J. Cassibry	Thomas J. MacBride
Samuel Conti	Frank J. McGarr
Howard F. Corcoran	James B. Parsons
Walter Early Craig	Robert F. Peckham
Jesse W. Curtis	Norman C. Roettger, Jr.
Peter T. Fay	Donald R. Ross
Warren J. Ferguson	Robert A. Schnacke
Robert Firth	Collins J. Seitz
Roger D. Foley	John V. Singleton, Jr.
Charles B. Fulton	Adrian A. Spears
Floyd R. Gibson	Robert A. Sprecher
William P. Gray	Albert Lee Stephens, Jr.
George L. Hart, Jr.	Francis C. Whelan
A. Andrew Hauk	Hubert L. Will
Irving Hill	David W. Williams
James Lawrence King	Spencer Williams
Samuel P. King	Harrison L. Winter
Thomas D. Lambros	Joseph H. Young

STATEMENT OF THE CASE

A. Nature of the Case.

Although the Certificate of the Court of Claims states the nature of plaintiffs' claims pending in that Court, plaintiffs respectfully submit that the statement of the issues as set forth in the Certificate requires amplification relevant to the certified question.

First, with all respect to the Court of Claims, it is our view that the question raised in Count I may best be

[1] (Continued)

The parties plaintiff in *Bechtle* v. *United States* (Ct. Cl. No. 132-76) are:

Louis C. Bechtle	Abraham L. Marovitz
Edward R. Becker	Wade H. McCree, Jr.
John Biggs, Jr.	Edward J. McManus
Luther Bohanon	William O. Mehrtens
Raymond J. Broderick	C. A. Muecke
William J. Campbell	Clarence C. Newcomer
Thomas J. Clary	Edmund L. Palmieri
Ralph M. Freeman	John W. Peck
Leonard I. Garth	Martin Pence
James F. Gordon	Joseph Sam Perry
Myron L. Gordon	John W. Reynolds
Peirson M. Hall	Edwin A. Robson
A. Leon Higginbotham, Jr.	Carl B. Rubin
Julius J. Hoffman	Murray M. Schwartz
Damon J. Keith	Edwin D. Steel, Jr.
Morris E. Lasker	Bruce R. Thompson
Alfred L. Luongo	Thomas P. Thornton
Lawrence T. Lydick	James A. von der Heydt
Albert B. Maris	John H. Wood, Jr.

defined as follows: The Constitution provides that judges shall receive ". . . a Compensation . . . which shall not be diminished . . . ." Art. III, Sec. 1. Can the United States, then, refuse to maintain judges' real dollar salaries while maintaining the real dollar salaries of nearly all other federal employees? The difference between this formulation and that of the Court of Claims is that this formulation raises the question of discrimination against federal judges—a question which we conceive as having constitutional import.[2]

Second, Count I involves a question of interpretation of Article III, Section 1 of the Constitution, which by its express language affects only federal judges serving pursuant to that Section. Count II presents the question of the constitutionality of Section 225(i)(1)(B) of the Postal Revenues and Federal Salary Act of 1967, 2 U.S.C. Sec. 359(1)(B), allowing lawful executive actions to be legislatively vetoed by a single house of Congress. In Count II plaintiffs maintain that a one-house veto is unconstitutional, that Senate Resolution 293 passed pursuant thereto in March of 1974, is void and that therefore salary adjustments submitted by the President under the Salary Act became effective in March 1974. Count II thus affects both judges and other federal employees.

Third, the Certificate of the Court of Claims, while recognizing that the "doctrine of necessity" was invoked

[2] Plaintiffs have filed two briefs in the Court of Claims; the first supporting their motion for summary judgment and the second in reply to the government's contentions. The first will be referred to here as PSJ, and the second as PRB. The briefs are now on file in the Supreme Court Clerk's office. The relation of discrimination to Article III, Sec. 1, is discussed at PSJ 32-39. The question of disqualification is discussed at PSJ 6-9.

in *Evans* v. *Gore*, 253 U.S. 245 (1920),[3] states that "A strongly worded statute . . . was enacted long after" that case was decided, which statute, "taken literally, requires each [judge] . . . to disqualify himself in these cases . . ." (and presumably would require all other judges to do the same). (*See* App. pp. 4A, 5A) The Certificate does not mention that a disqualification statute was in effect when *Evans* v. *Gore* was decided.[4]

B. The Present Posture of the Case.

As stated in the Certificate, defendant has filed in the Court of Claims a motion to dismiss the consolidated cases and plaintiffs have filed their response to that motion to dismiss and a motion for summary judgment. Defendant has filed its reponse to plaintiffs' motion for summary judgment. The claims have been fully briefed by all parties to the litigation, there are no material facts in dispute which affect the liability issues and the dispute as to liability is ready for disposition.[5]

[3] In *Evans* v. *Gore*, the Supreme Court, at the behest of a plaintiff who was a federal judge, held that federal judges could not be compelled constitutionally to pay income tax. The case is discussed at pp. 9-10 *infra*.

[4] Further, it should be noted that this is not a class action. No judge has a *direct* interest in the outcome. Rather, judges are interested by virtue of the legal principle that might be established.

[5] It should also be noted that plaintiffs discussed the question of disqualification in their briefs, PSJ 6-9, but the Government did not discuss the matter directly. Rather, the Government referred to the subject as indirectly supporting its argument that the Court of Claims lacked jurisdiction to entertain plaintiffs' claims. *See* Defendant's Brief in Support of its Motion to Dismiss, (DB) pp. 3-14 and *see* Defendant's Reply Brief (DRB), pp. 5-9, 15-17. Plaintiffs argue that the Court of Claims clearly has jurisdiction to hear these cases under the Tucker Act which vests the

ARGUMENT

THE QUESTION OF DISQUALIFICATION

At common law, the judge was disqualified from participating in any case in which he had a direct pecuniary interest. Frank, "Disqualification of Judges", 56 Yale L.J. 605, 609-10 (1947). The common law courts very early adopted, assimilated, and applied with equal vigor the rule of necessity. It was realistically recognized that the two concepts—disqualification and necessity—are inseparable, for the object of disqualification is to insure that, where possible, a judge is disinterested in the matters at issue; its object is not to preclude access to a judicial forum, or to bar judicial determination of the legal issues raised. Where the policy of disqualification conflicts with a litigant's rights to obtain a judicial remedy, it has been generally conceded that the former must yield to the latter, trusting the conscience of the court to achieve a just result.

The English courts have traced the history of the "rule of necessity" back to 1430 and the Yearbooks. *Dimes* v. *Grand Junction Canal Co.*, 10 Eng. Rep. 301, 313 (1852). *See* "The Independence of the Judiciary", 34 Can. B. Rev. 769, 790 (1956). And, when a court temporarily ignored the rule, it was immediately corrected by the Legislature. Thus, Parliament in 1743 provided that tax paying-justices of the peace could sit in local government cases, avoiding

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[5] (Continued)
Court of Claims with jurisdiction "to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress . . . ." 28 U.S.C. §1491. *See* PSJ 3-17; PRB 5-10, 17-22.

any need for them to disqualify themselves as tax payers. As one noted commentator has written:

> Thus grew the modern rule of "necessity" that judges should not decline to sit where no substitute was readily available. As Pollock later expressed it, 'the settled rule of law is that, although a judge had better not, if it can be avoided, take part in a decision of a case in which he has any personal interest, yet he not only may, but must do so if the case can not be heard otherwise.' And this remains the American practice. Frank, *supra* at 610-611

As stated by the Tenth Circuit in *Brinkley* v. *Hassig*, 83 F.2d 351, 357 (10th Cir. 1936):

> From the very necessity of the case has grown the rule that disqualification will not be permitted to destroy the only tribunal with power in the premises. If the law provides for a substitution of personnel on a board or court, or if another tribunal exists to which resort may be had, a disqualified member may not act. *But where no such provision is made, the law cannot be nullified or the doors of justice barred because of prejudice or disqualification of a member of a court or an administrative tribunal.* (emphasis added)

The "rule of necessity" has been applied consistently by state courts,[6] and by federal courts.[7] It has allowed

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[6] *See, e.g., McCoy* v. *Handlin*, 153 N.W. 361 (S.D. 1915); *State ex rel. Gardner* v. *Holm*, 62 N.W.2d 52 (Minn. 1954); *Higer* v. *Hansen*, 170 P.2d 411 (Idaho 1946); *State ex rel. Null* v. *Polley*, 138 N.W. 300 (S.D. 1912); *State ex rel. Mitchell* v. *Sage Stores Co.*, 143 P.2d 652 (Kan. 1943); *Gordy* v. *Dinnis*, 5 A.2d 69 (Md. 1939). An extensive collection of cases discussing the "rule of necessity" is com-

judges to sit on matters involving judicial salaries[6]; it led Chancellor Kent to decide a case in which his brother was

[6] (Continued)
piled in the annotation found at 39 A.L.R. 1476, following the reported case of *State ex rel. Miller* v. *Aldridge*, 212 Ala. 660, 103 So. 835, 39 A.L.R. 1470 (1925). In the *Miller* case the Court found it unnecessary to determine the applicability of a "rule of necessity" to hearings before a State Board of Accountancy, the court holding that there existed no circumstance of necessity under the facts of that case.

[7] *Evans* v. *Gore*, 253 U.S. 245 (1920); *Miles* v. *Graham*, 268 U.S. 501 (1925); *O'Malley* v. *Woodrough*, 307 U.S. 277 (1939); *Brinkley* v. *Hassig*, 83 F.2d 351 (10th Cir. 1936); *United States* v. *Corrigan*, 401 F. Supp. 795 (D. Wyo. 1975); *Turner* v. *American B. Ass'n*, 407 F. Supp. 451 (N.D. Tex., 1975).

[8] For example, the Supreme Court of South Dakota, in *McCoy* v. *Handlin*, *supra*, applied the "rule of necessity" to preclude the disqualification of its members in a mandamus action brought by one of the judges of that court to compel the State Auditor to pay an additional $50.00 per month, pursuant to a statute which required such payments be made to Supreme Court justices who had changed their legal residences to the State Capitol. The Court reasoned that disqualification would cause a "failure of justice" and therefore invoked the "rule of necessity". 153 N.W. 361 (S.D. 1915).

Similarly, in *State ex rel. Gardner* v. *Holm*, *supra*, a mandamus action was brought to compel payment of judicial salaries under a statute which had been passed by the Minnesota legislature but which had not been acted upon by the governor. The petitioners contended that the statute became law without the governor's signature. The Supreme Court of Minnesota addressed the obvious problem squarely:

> [W]e must frankly admit that there is such an indirect interest that were it possible to do so we should all be happy to declare ourselves disqualified. Nothing is better established than the principle that no judge or tribunal should sit in any case in which he is di-

a party.[9] In America it has always been applied in the presence of statutes that read very much like the current federal statute on disqualification.[10]

The controlling decisions of the Supreme Court on the subject of the "rule of necessity" are the three decisions in *Evans* v. *Gore*, 253 U.S. 245 (1920), *Miles* v. *Graham*, 268 U.S. 501 (1925), and *O'Malley* v. *Woodrough*, 307 U.S. 277 (1939). Each of those cases involved plaintiffs who were judges claiming that the federal government could not constitutionally require an Article III judge to pay income tax. Each of those cases was decided in the presence of a statute which disqualified a judge who was "in any way concerned in interest in any suit pending. . . ." 36 Stat. 1090 (1911). The *Evans* Court, discussing the question of disqualification held:

> Because of the individual relation of the members of this Court to the question . . . we cannot but regret that its solution falls to us, and this although

[8] (Continued)
> rectly or indirectly interested. . . . However, this principle must yield to the stern necessities of a case; and when there is no other tribunal that can determine the matter, it is the duty of the court, which would ordinarily be disqualified, to hear and determine the case, however disagreeable it may be to do so. The judicial function of courts may not be abdicated even on the grounds of interest when there is no other court that can act. 62 N.W.2d at 53-54.

[9] *In re Leefe*, 2 Barb. Ch. 39 (N.Y. 1846).

[10] *See* Act of May 8, 1792, ch. 36, §11, 1 Stat. 278; 3 Stat. 643 (1821); Section 601 of the Revised Statutes of 1873-1874; 36 Stat. 1090 (1911); 62 Stat. 908 (1948); 88 Stat. 1609, 28 U.S.C. §455 (1974). The statutes, their language and their effects, are discussed in detail at pp. 13-24, *infra*.

> each member has been paying the tax in respect of his salary voluntarily and in regular course. But jurisdiction of the present case *cannot* be declined or renounced. The plaintiff was entitled by law to invoke our decision on the question as respects his compensation, in which no other judge can have any direct personal interest; and there was no other appellate tribunal to which under the law he could go. He brought the case here in due course. . . . In this situation the only course opened to us is to consider and decide the cause — a conclusion supported by precedents reaching back many years. 253 U.S. at 247-48.

After surveying the field, a leading authority on administrative law wrote in 1958 that *Evans* v. *Gore* still states the law of this subject. Davis, *Administrative Law Treatise* §12.04 (1958).

The federal courts most recently applied the "rule of necessity" in 1975 — after the statute quoted by the Court of Claims in its Certificate was enacted. In *United States* v. *Corrigan,* 401 F. Supp. 795 (D. Wyo. 1975), Corrigan asked for disqualification on the ground that the judge was a defendant in a different suit that Corrigan had filed against nearly every federal judge in the country. The Court held that the judge need not disqualify himself. The Court stated:

> Another statute, 28 U.S.C. §455, provides that a judge shall disqualify himself in any case in which he has a substantial interest or his impartiality might be questioned. Ordinarily when a judge is named as a defendant in a suit brought by a defendant before him in trial, such judge should automatically disqualify himself.

> However, necessity may obviate this rule when virtually no judge would be available to hear the suit because all federal judges are co-defendants. See *Butler* v. *Daly* v. *The ABA, et al.,* No. 75-C-72 (N.D. Ill., order entered by Judge Frank McGarr on Jan. 9, 1975); *Evans* v. *Gore,* 253 U.S. 245, 40 S.Ct. 550, 64 L.Ed. 887 (1920); *Brinkley* v. *Hassig,* 83 F.2d 351 (10th Cir. 1936). In this situation, if we were to disqualify ourself from hearing the matter on the ground urged by defendant, there would be few, if any, federal judges who could hear the trial and none in this circuit. Thus, we conclude that the necessity for the case to be heard by a federal judge militates strongly against disqualification of this judge. 401 F. Supp. at 798.

In *Turner* v. *American B. Ass'n,* 407 F. Supp. 451 (N.D. Tex., 1975), ten cases were assigned to Chief Judge Reynaldo G. Garza, Jr. of the Western District of Texas. These cases named as defendants virtually the entire federal judiciary, but not Chief Judge Garza. The government urged Chief Judge Garza to dismiss these cases and also to enter an injunction prohibiting the initiation of future cases to avoid the complex proceedings that would be necessary to assign all such cases to him personally (since nearly all other judges would be disqualified).

The Court held that 28 U.S.C. §455 does not disqualify judges named as defendants from presiding if virtually every member of the judiciary is also a named party. Thus, the injunction was unnecessary, for future suits would not all have to be assigned to Chief Judge Garza. The Court stated:

> With respect to disqualification in civil actions where the trial judge to which the case happens to be assigned

is also a defendant in the same action, 28 U.S.C.A. §455 would require that the judge disqualify himself. This Court notes, however, that there is a maxim of law to the effect that where all are disqualified, none are disqualified. Evans v. Gore, 253 U.S. 245 . . . . The theory supporting this maxim is that if disqualification operates so as to bar justice to the parties and no other tribunal is available, the disqualified judge or judges may by necessity proceed to judgment. 48 C.J.S. Judges §74. Although this maxim would allow the Supreme Court to proceed where all or a quorum of the justices have been sued, it would seemingly not allow a District Court Judge to proceed if other judges are available by substitution. *Brinkley* v. *Hassig,* 83 F.2d 351 (C.A. 10, 1936). 407 F. Supp. at 483.

In sum, plaintiffs have found that in resolving cases involving both disqualification and the principle of necessity, courts have consistently held in favor of having the case at issue heard.[11] Thus, plaintiffs' research has

[11] Plaintiffs read the Supreme Court's actions in *United States* v. *Aluminum Co. of America,* 320 U.S. 708 (1943) and *North American Company* v. *Securities and Exchange Commission,* 320 U.S. 708 (1943); 327 U.S. 686 (1946), as supporting this principle. In *Alcoa,* an antitrust case, four Supreme Court Justices disqualified themselves from participating in the direct appeal from the district court, and a lack of a quorum then initially prevented the appeal from being heard. The Supreme Court, on October 18, 1943, transferred the case "to a special docket" and "postponed" all further proceedings "until such time as there is a quorum of Justices qualified to sit in it, when it will be restored to the regular docket for such further proceedings as may be appropriate." 320 U.S. at 708-709. By June 9, 1944, Congress enacted a special statute that allowed appeal in the *Alcoa* case to a Circuit Court of Appeals made up of sitting federal judges.

uncovered no case in which disqualification provisions prevented a case from being heard. Plaintiffs have found numerous cases in which the "rule of necessity" prevented from taking effect a disqualification that would otherwise have been required.

The many cases applying the "rule of necessity" were decided against a background of statutes providing for disqualification of interested judges. The first American disqualification statute, enacted in 1792, provided that:

> In any district court . . . in which it shall appear that the judge . . . is, anyways, concerned in interest, . . . it shall be the duty of such judge . . . to cause the fact to be entered in the minutes of the court . . . [and to certify the minutes to the circuit court, which

[11] (Continued)

Act of June 9, 1944, Pub. L. No. 332, ch. 239, 58 Stat. 272. (This avenue is unavailable here, where all sitting judges are similarly "interested.") The Court's actions in the accompanying *North American Company* case should be contrasted with its actions in *Alcoa.* Initially, the Court transferred that case to its "special docket" along with the *Alcoa* case, for similar reasons. Unlike *Alcoa,* Congress could make no special provision for appeal in the *North American Company* case as it came, not from the district court (as did *Alcoa*), but from the Court of Appeals. The Supreme Court did not allow the case to go undecided, nor did it simply allow the lower court decision to stand (an avenue unavailable here where lower court and appellate court judges are equally "interested"). Rather, the Supreme Court subsequently withdrew the case from the "special docket" and rendered its decision after Chief Justice Stone withdrew his disqualification. He did so, according to the leading commentator on the subject, so the case could be decided. See Frank, "Disqualification of Judges: In support of the Bayh Bill," 35 Law & Contemp. Prob. 43, 44 (1970).

shall proceed to hear the case]. Act of May 8, 1792, Ch. 36, §11, 1 Stat. 278.[12]

This statute, as amended in 1821,[13] was, in the words of the Supreme Court, intended to provide

> that a man should not be a judge in his own cause

and it

> requires a judge found in that predicament, on the motion of either party, to make an order for the removal of the cause *to another competent jurisdiction.*

Spencer v. *Lapsley,* 61 U.S. (20 How.) 264, 266 (1857) (emphasis added).

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[12] The full text reads:
§11. And it be further enacted, that in all suits and actions in any district court of the United States, in which it shall appear that the judges of such court is, anyways, concerned in interest, or has been of counsel for either party, it shall be the duty of such judge in application of either party, to cause the fact to be entered in the minutes of the court, and also to order an authenticated copy thereof, with all the proceedings in such suit or action to be forthwith certified to the next circuit court of the district, which circuit court shall, thereupon, take cognizance thereof, in like manner, as it it had been originally commenced in that court, and shall proceed to hear and determine the same accordingly. Act of May 8, 1792, ch. 36, §11, 1 Stat. 278.

[13] The full text reads:
That in all suits and actions in any district court of the United States, in which it shall appear that the judge of such court is any ways concerned in interest, or has been of counsel for either party . . . so . . . as to render it improper for him, in his opinion, to sit on the trial of such suit or action, it shall be the duty of such judge, on application of either party, to cause the fact to be entered on the records of the court. . . . Act of March 3, 1821, ch. 51, 3 Stat. 643 quoted in *Spencer* v. *Lapsley,* 61 U.S. (How.) 266 (1857).

After further amendment in 1873-74,[14] the provision was revised in 1911 to read:

> Whenever it appears that the judge of any district court is in any way concerned in interest in any suit pending therein . . . it shall be his duty, on application by either party, to cause the fact to be entered on the records of the court; . . . ['to certify the entry to the senior circuit judge'] and thereupon such proceedings shall be had as are provided in Section Fourteen.[15]

Act of March 3, 1911, ch. 231, 36 Stat. 1090 (1911).

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[14] The full text reads:
§601. Whenever it appears that the judge of any district court is in any way concerned in interest in any suit pending therein, or has been of counsel for either party, or is so related to or connected with either party as to render it improper, in his opinion, for him to sit on the trial, it shall be his duty, on application by either party, to cause the fact to be entered on the records of the court; and, also an order that an authenticated copy thereof, with all the proceedings in the suit, shall be forthwith certified to the next circuit court for the district; and if there be no circuit court therein, to the next circuit court in the state; and if there be no circuit court in the State, to the next convenient circuit court in an adjoining state; and the circuit court shall, upon the filing of such record with the clerk, take cognizance of and proceed to hear the case, in like manner as if it had been originally and rightfully commenced there. Section 601, Revised Statutes of 1873-74.

[15] The full text reads:
Sec. 20. Whenever it appears that the judge of any district court is in any way concerned in interest in any suit pending therein, or has been of counsel or is a material witness for either party, or is so related to or connected with either party as to render it improper, in his opinion, for him to sit on the trial, it shall be his duty, on application by either party, to cause the fact to be entered on the records of the

This statute, which was the law when *Evans* v. *Gore, supra, Miles* v. *Graham, supra,* and *O'Malley* v. *Woodrough, supra,* were decided, was enacted because:

> By reason of the proposed abolishment of the circuit courts, the latter portion of §601 revised statutes becomes obsolete and is omitted. Instead of certifying the case to the circuit court, the section as revised makes it the duty of the circuit judge, senior in commission, then present in the circuit, to designate *some other judge* to sit on the trial of the case in which the resident judge is disqualified. (emphasis added)

House Doc. No. 783, Vol. 27, part F, Revision of Laws Judiciary Title, 81st Cong., 2d Sess. 1909-10 (1911) (emphasis added). *See also* Sen. Rep. No. 388, vol. 4, p. 11 (61st Cong., 2d Sess.,1910) (same language).[16]

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[15] (Continued)

court; and also an order that an authenticated copy thereof shall be forthwith certified to the senior circuit judge for said circuit then present in the circuit; and thereupon such proceedings shall be had as are provided in section fourteen."

[16] The entire legislative history fails to demonstrate any mention of the "rule of necessity" or a desire to change it, as motivating the 1911 Act. (A statement by Congressman Cullop vaguely suggests, however, that although he disapproved of the "rule of necessity" he recognized that it was the governing law. 46 Cong. Rec. 305-7 (Dec. 14, 1910).) *See, re:* legislative history—H. Rep .No. 818 (61st Cong., 2d Sess., 1910); H. Doc. No. 783, Vol. 127, pt. 1 (61st Cong., 2d Sess., 1910); S. Rep. No. 388 (61st Cong., 2d Sess., 1910); S. Doc. No. 818 (61st Cong., 2d Sess., 1910).

Debates on bill H.R. 23377: House debate: 45 Cong. Rec. 2937 (March 9, 1910); *Id.* at 3179 (March 15, 1910); *Id.* at 3585 (March 23, 1910); *Id.* at 3596-3614 (March 23, 1910); *Id.* at 3998-4001 (March 30, 1910); 46 Cong. Rec. 83-97 (Dec. 7, 1910); *Id.* at 294 (Dec. 14, 1910); *Id.* at 305

The 1911 statute was revised in 1948 to read that any "justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest . . . ." 62 Stat. 908 (1948). The Revisor's Notes indicate that the reason the words "shall disqualify" were inserted into the statute is that Congress no longer wished to specify in the disqualification section the precise manner in which substitute judges were to be designated; the procedure for selecting alternative judges was adequately set out elsewhere in Title 28.[17]

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[16] (Continued)

(Dec. 14, 1910); *Id.* at 564-76 (Dec. 21, 1910); *Id.* at 789-811 (Jan. 11, 1911); *Id.* at 1060-79 (Jan. 18, 1911); *Id.* at 1432-60 (Jan. 25, 1911); *Id.* at 1773-1793 (Feb. 1, 1911); *Id.* at 2143-2167 (Feb. 8, 1911); *Id.* at 2606-2634 (Feb. 15, 1911); 46 Cong. Rec. App. 52-53.

Senate debate: 46 Cong. Rec. 731 (Jan. 10, 1911); *Id.* at 839-40 (Jan. 13, 1911); *Id.* at 928-54 (Jan. 16, 1911); *Id.* at 1536-45 (Jan. 27, 1911); *Id.* at 2131-40 (Feb. 8, 1911); *Id.* at 3258 (Feb. 24, 1911); *Id.* at 3760-4 (March 1, 1911); *Id.* at 3847 (March 2, 1911); *Id.* at 3853 (March 2, 1911); *Id.* at 3998-4012 (March 2, 1911); 46 Cong. Rec. App. 213, 216.

[17] The Revisor's Notes (contained at 28 U.S.C.A. § 74 (1968)) state on this point:

> The provision of said section 24 of Title 28 U.S.C., 1940 ed., as to giving notice of disqualification to the "senior circuit judge," and words "and thereupon such proceedings shall be had as are provided in sections 17 and 18 of this title," were omitted as unnecessary and covered by section 291 et seq. of this title relating to designation and assignment of judges. Such provision is not made by statute in case of disqualification or incapacity, for other cause. See sections 140, 143, and 144 of this title. If a judge or clerk of court is remiss in failing to notify the chief judge of the district or circuit, the judicial council of the circuit has ample power under section 332 of this title to apply a remedy.

The legislative history of the 1948 Revision discloses no indication whatsoever that Congress intended to modify or to repeal the preexisting Rule of Necessity.[18] Indeed, cases invoking that rule have been decided since the enactment of the 1948 statute, and, as previously mentioned, a leading commentator noted in 1958, after surveying the relevant law, that *Evans* v. *Gore* is "still a realistic guide on the rule of necessity." Davis, *Administrative Law Treatise* § 12.04 (1958).[19]

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[17] (Continued)

The other changes that were made served the following purposes according to the revisors:

> Section 24 of Title 28 U.S.C., 1940 ed., applied only to district judges. The revised section is made applicable to all justices and judges of the United States. The phrase "in which he has a substantial interest" was substituted for "concerned in interest in any suit." . . . Relationship to a party's attorney is included in the revised section as a basis of disqualification in conformity with the views of judges cognizant of the grave possibility of undesirable consequences resulting from a less inclusive rule. Changes were made in phraseology.

[18] *See*, on bill H.R. 2055 introduction on February 19, 1947, 93 Cong. Rec. 1154.

On bill H.R. 3214 (substituted for H.R. 2055): H. Rep. No. 308 (80th Cong., 1st Sess., 1947); S. Rep. No. 1559 (80th Cong., 2d Sess. 1948); Debate: 94 Cong. Rec. 7500 (June 9, 1948; Senate), 94 Cong. Rec. 7927-30 (June 12, 1948; passed Senate), 94 Cong. Rec. 8297 (June 15. 1948; Senate), 94 Cong. Rec. 8498-8501 (June 16, 1948; passed House), 94 Cong. Rec. 8540 (June 17, 1948; House), 94 Cong. Rec. 8714 (June 17, 1948; House), 94 Cong. Rec. 9367 (June 17, 1948; House).

[19] *See also United States* v. *Corrigan, supra; Turner* v. *United States, supra,* discussed at pp. 10-12 of this Brief.

The statute was again revised in 1974. It now reads in relevant part that any:

> justice, judge, magistrate, or referee in bankruptcy . . . shall disqualify himself . . . [when] he . . . has a financial interest in the subject matter in controversy . . . or any other interest that could be substantially affected by the outcome of the proceeding . . . [Moreover, he shall not] accept from the parties . . . a waiver of any ground for disqualification. . . .

88 Stat. 1609 (1974), 28 U.S.C. § 455.[20] As the Court of Claims makes clear in its Certificate, the purpose of this revision was to conform statutory law with the Code of Judicial Conduct of the American Bar Association—a Code adopted by the Judicial Conference of the United States, with modifications, and approved on April 6, 1973, and March 6, 1975.

Plaintiffs have examined the Reports that accompanied the adoption of the Code by the Judicial Conference and the legislative history of the 1974 Statute. There is no mention in either the Reports, or in the legislative history, or in any other materials available to plaintiffs, of the "rule of necessity," nor is there any indication of an intent to modify or to overturn that longstanding doctrine.[21]

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[20] The text of the Statute is set forth in the Certificate of the Court of Claims, App. 4a to this Brief.

[21] *See* Hearings before the Subcommittee on Improvements in Judicial Machinery, Committee on the Judiciary, on S. 1064, July 14, 1971; May 17, 1973; S. Rep. No. 93-419 (93rd Cong., 1st Sess., 1973); H. Rep. No. 93-1453 (93rd Cong., 1st Sess., 1974); Debate: 119 Cong. Rec. Daily Ed. (October 4, 1973, Senate); 119 Cong. Rec. Daily Ed. (Nov. 21, 1974, Senate); 120 Cong. Rec. Daily Ed. (Nov. 18, 1974, House).

There are other indications in the history suggesting a Congressional intent to preserve the "rule of necessity." Senator Bayh, the revision's author, testified that the changes reflected the opinions of John P. Frank, a former

[21] (Continued)

Indeed, there is much in this legislative history indicating that the only context in which disqualification was being considered was where a single judge might have an interest that other judges would not. This is manifest in the many references to the ability to have another judge hear a case if the assigned judge felt at all unsure about hearing it. *See,* Hearings, *supra,* at 18 (testimony of Sen. Bayh, at 26); (testimony of Sen. Hollings) "[I]f a judge is disqualified from one case, then there are . . . several other judges who could hear that case."; at 74 (testimony of Sen. Burdick) "Certainly at a time when there are 667 other Federal judges active and retired . . . it is not inappropriate for Congress to say that a judge, whose impartiality might reasonably be questioned, should step aside and let another judge handle the proceeding." (Plaintiffs include this reference only to show that Sen. Hollings had the availability of other judges directly in mind. Plaintiffs express no view on the constitutionality of Congress' legislating rules that disqualify Article III judges.)

Plaintiffs have also examined the relevant parts of the following: the indices of the Report of the Judicial Conference of the United States from December, 1922 to March, 1962; the compiled index of the Proceedings of the Judicial Conference of the United States, 1962-1972, Appendix 4, published in the Judicial Conference Report (1972) (*see* p. 681); the individual indices of the Report of the Proceedings of the Judicial Conference for 1973, 1974, 1975, 1976; (*see* 1973, p. 83; 1974, p. 99; Sept. 1975, p. 81; March 1975, p. 39); The Joint Committee on Standards of Judicial Conduct, Report of the Judicial Conference for 1973, *see* pp. 9-11, *id.* for March 1975, *see* p. 12.

Our reading of this material leads us to conclude that the Conference intended not to alter the strictures upon a judge previously existing in statutes or Conference resolutions. Agenda for Judicial Conference of April 5, 1973; Agenda No. 3-A, p. 2.

professor of law at Yale University[22] (now practicing law). The identical Senate and House reports also draw explicit attention to Mr. Frank's testimony,[23] which was based upon an article he had written on disqualification of judges.[24] Mr. Frank's article, written in support of the Bayh bill, and fully reflecting the ABA Code of Judicial Conduct which the Bayh Bill incorporated, recognized the "rule of necessity" as an integral part of the disqualification statute.[25]

It is intimated in the Court of Claim's Certificate that the addition in the 1974 statute of a provision prohibiting judges from accepting from the parties a waiver of disqualification may indicate the demise of the "rule of necessity." This addition, however, appears to have nothing to do with the "rule of necessity." It refers to the prior practice of parties waiving disqualification of an "interested" judge—a practice that was not at issue in the "rule of necessity" cases cited at pp. 7-9 & n. 6, 7, *supra,* and which was at issue in many cases not involving the "rule of necessity."[26]

[22] *Hearings, supra,* at 10.

[23] S. Rep. No. 93-419, *supra,* at 3; H. Rep. No. 93-1453, *supra,* at 3.

[24] Frank, "Disqualification of Judges: In Support of the Bayh Bill," 35 *Law & Contemp. Prob.* 43 (1970).

[25] *Id.* at 44.

[26] *See, e.g., Adams* v. *United States,* 302 F.2d 307 (5th Cir. 1962) (untimeliness of motion constituted waiver); *Utz & Dunn Co.* v. *Regulator Co.,* 213 F. 315 (8th Cir. 1914) (parties request for expeditious hearing constituted waiver); *Lampert* v. *Hollis Music, Inc.,* 105 F. Supp. 3 (E.D.N.Y. 1952) (same); *In re Fox West Coast Theatres,* 25 F. Supp. 250 (S.D. Cal. 1936); *aff'd,* 88 F.2d 212 (9th Cir.); *cert. denied,* 301 U.S. 710 (1937).

The Court of Claims, in its Certificate, also describes the 1974 revision as a "strongly worded" statute. We assume that the Court of Claims had in mind the use in the 1974 revision of the strong language "shall disqualify." This language, however, was taken from the 1948 recodification. And, it was inserted there in order to avoid specifying the procedure for finding a substitute judge—not to change the substantive law of disqualification. *See* pp. 17-18, *supra.*

Independent of the Certificate, there is a statement in the Congressional Reports accompanying the 1974 revision that the revision "has the effect of removing the so-called 'duty to sit.'" 1974 U.S. Code Cong. & Ad. News 6351, 6355. An examination of *Edwards* v. *United States,* 334 F.2d 360 (5th Cir. 1964)—the illustrative case cited in the House and Senate Reports—shows, however, that the "rule of necessity" was not at issue.[27] Rather, *Edwards* involved a judge's belief that he was required to hear a case if he felt he was not disqualified *no matter how close the question of disqualification.* The House Report makes clear that, in a close case, a judge *can* disqualify himself in such cases (even if he thinks he is qualified)—that is to say, he is under no "duty to sit" in such a case. It is apparently assumed by *Edwards,* and certainly by both the House and Senate Reports, that other judges are available to hear the case. In defense of the tighter restrictions on waiver of a judge's disqualification, both reports (identical in this respect) noted that there were "667 federal judges, active and retired," who *could* hear the case.[28]

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[27] H. Rep. No. 93-1453 (93rd Cong., 1st Sess. 1973) at 5; S. Rep. No. 93-419 (93rd Cong., 1st Sess., 1973) at 5.

[28] *Id.* at 7 (respectively). *See also* fn. 21, *supra.*

In interpreting Congressional silence as to the "rule of necessity" two further matters are relevant: (1) It is a well accepted canon of statutory interpretation that, in the absence of clearly expressed intent to the contrary, recodification of a statute indicates approval of interpretations made prior to re-enactment.[29] Moreover, "it is not presumed that the common law is changed by statutory enactment; and statutes in derogation of the common law are strictly construed."[30] 2A C.Sands *Sutherland Statutory Construction,* §45.12 (1973).

(2) To impute to Congress an intent to overturn the "rule of necessity" would bring about results of the most far-reaching consequence. If all judges are disqualified from hearing the present case they would be similarly disqualified should Congress directly enact legislation cutting stated salaries of all judges by 50% or requiring all judges to retire at age 50. Yet, such legislation would be obviously unconstitutional. Indeed, if the courts are to be closed to judges as plaintiffs in such circumstances on grounds of disqualification, the safeguards provided in Article III's efforts to secure an independent judiciary would be reduced to a nullity.

Moreover, it is doubtful whether a statute construed to disqualify judges in a case such as this one would be constitutional. Whether Congress can constitutionally

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[29] *See general,* 2A C.Sands *Sutherland Statutory Construction* (1973) §§45.12, 49.07, 49.09, 56.01 and cases cited therein; *Francis* v. *Southern Pac. Co.,* 333 U.S. 445, 450 (1948); *Helvering* v. *R.J. Reynolds Tobacco Co.,* 306 U.S. 110 (1939); *Helvering* v. *Griffiths,* 308 U.S. 371 (1943); *Jones* v. *Liberty Glass Co.,* 332 U.S. 524 (1947).

[30] *Sutherland, supra. See also* cases cited at *Id.* notes 9 and 10.

close the courts to plaintiffs asserting a claim of infringement of a basic constitutional protection is a matter that has been much debated, both by this Court, *see Oestereich* v. *Selective Service System Local Board No. 11,* 393 U.S. 233 (1968), and by legal scholars, *see* Bator, Shapiro, Mishkin, Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System,* 330-375 (2d ed. 1973). The more current view suggests that access to courts to secure important rights cannot be foreclosed. *Cf. Boddie* v. *Connecticut,* 401 U.S. 371 (1970).

In sum, we do not conceive that either Congress or the Judicial Conference, in revising the 1911 statute, intended, without mentioning the matter, 1) to abolish the well-established common law "rule of necessity", 2) to overrule three Supreme Court cases directly on point, 3) to destroy the fundamental protection that Article III, Section 1, provides in its efforts to maintain an independent judiciary, and 4) to enact a statute of dubious constitutionality insofar as it takes from the courts their power to determine certain constitutional questions. It is not surprising that the "rule of necessity" has been reaffirmed in the courts since the enactment of the 1974 revision.[31]

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[31] There is one case in the lower courts that might suggest ordinary disqualification rules may not apply if the issues raised in a case are frivolous. *Kinnear-Weed Corp.* v. *Humble Oil & Rfg. Co.,* 324 F. Supp. 1371, 1381 (S.D. Tex. 1969), *aff'd,* 441 F.2d 631 (5th Cir. 1965), *cert. denied,* 404 U.S. 941 (1971). Whatever the merits of this view, the present case, in plaintiffs' view, raises serious and meritorious constitutional questions directly arising out of Article III's design to secure an independent judiciary. The briefs of both plaintiffs and defendant discussing those questions are on file in the Office of the Supreme Court Clerk.

Finally, Count II of plaintiffs' suit raises a discreet issue with respect to disqualification. Plaintiffs allege in Count II, that § 225 (i)(1)(B) of the Postal Revenue and Federal Salary Act of 1967 (2 U.S.C. § 359 (1) (B)) is unconstitutional because it allows one house of Congress to veto legislatively authorized Presidential action (taken pursuant to authority delegated by a statute enacted by both houses of Congress and signed by the President). If plaintiffs are right in their argument on the merits, the pay increases recommended to Congress by the President in 1973 automatically took effect, for the Senate resolution setting them aside was void, and Congressmen, higher ranking civil servants, and officers in the Executive Branch, as well as judges, thus become entitled automatically to increased salaries.[32]

Count II is thus much like a case that affects the tax liability of both judges and many other citizens or a case involving the legality of tax assessments that judges as well as others must pay. To disqualify all judges from sitting in these cases on the ground that their salaries could be affected is to disqualify them regardless of whether the plaintiff is a judge, a congressman, a civil servant, or anyone else with standing, for in any such case a sitting judge would have an "interest" the value of which "the outcome of the proceeding could substantially affect." 28 U.S.C. § 455. Thus no one could attack the "one-house veto" here at issue. The unreasonableness of that result both suggests that judges are not dis-

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[32] *Cf., United States* v. *Ravich,* 421 F.2d 1196 (2d Cir. 1970), in which a judge is not disqualified because he is but one among many stockholders in a company, and is but one among many with similar interests. If Count II of the petition in this case is found to have merit, judges are but few among a great many with similar interests.

qualified from hearing the issues raised in Count II, and also illustrates why disqualification rules ordinarily involve a decision as to *which* judge will hear a case—not a decision as to whether a case will be heard at all.

CONCLUSION

For the reasons stated above, plaintiffs respectfully submit that the Judges of the Court of Claims are not disqualified from hearing and deciding these consolidated cases.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

C. CLYDE ATKINS, et al.	)	
v.	)	No. 41-76
THE UNITED STATES	)	
LOUIS C. BECHTLE, et al.	)	
v.	)	No. 132-76
THE UNITED STATES	)	

CERTIFICATE TO THE SUPREME COURT OF THE UNITED STATES
[Filed May 27, 1976]

I

The plaintiffs in the above-entitled cases are 82 United States District and Circuit Judges, each of whom has been duly appointed to his present office pursuant to Article III, Section 2, of the Constitution, and each alleges that he served in the office to which he was appointed during all or a part of the period commencing March 15, 1969, and continuing to March 25, 1976. Plaintiffs' amended petition in Docket No. 41-76 and plaintiffs' original petition in Docket No. 132-76 were filed March 25, 1976. On April 20, 1976, defendant filed a motion to dismiss the petitions, and on April 23, 1976, plaintiffs filed their response and a motion for summary judgment. As shown in the petitions, plaintiffs brought these actions in the Court of Claims under the Tucker Act, 28 U.S.C. § 1491, to recover money damages. The allegations in both petitions are identical and may be summarized as follows:

Count I

(1) Article III, Section 1 of the Constitution, prohibits the executive and legislative branches from reducing, directly or indirectly, the dollar amount of judicial salaries,

and also obligates those two branches of the Government to take such action as from time to time may be necessary to prevent diminishment of judicial compensation as a result of substantial reductions in the value of money.

(2) The salary of plaintiffs remained unchanged between March 15, 1969 and October 1, 1975. Between those dates, the real value of the dollar, measured by the Consumer Price Index, decreased by approximately 34.5 percent. As a result, the real value of the compensation for each district judge was diminished from $40,000 to about $26,200, and the real value of the salary of a circuit judge was reduced from $42,500 to about $27,800.

(3) Both the executive and legislative branches acted affirmatively to prevent Federal judges from receiving salary increases designed to offset the diminution in compensation caused by inflation. Pursuant to 2 U.S.C. Sections 351 *et seq.*, the Commission on Executive, Legislative, and Judicial Salaries recommended in 1973 that the salaries of Federal judges be increased by about 25 percent. However, the President submitted to Congress a recommendation that judicial salaries be increased 7.5 percent in each of the fiscal years 1974, 1975, and 1976. Had Congress taken no action, the increases proposed by the President would automatically have gone into effect, but the Senate voted to prevent the increases. On August 9, 1975, the Executive Salary Cost-of-Living Adjustment Act (Pub. L. 94-82) was enacted. It incorporates and perpetuates the diminution in the real value of judicial compensation which had occurred since March 1969. As a result of these actions by the President and Congress, the salary of a district judge on October 1, 1975, was set at $42,000, but when expressed in real terms is equal to $27,510. As of the same date, the salary of a circuit judge was set at $44,625, but when expressed in real terms is equal to $29,230.

(4) As a consequence of the foregoing, plaintiffs allege that they have suffered an unconstitutional deprivation of earning.

Count II

(5) In the Federal Salary Act of 1967, 2 U.S.C. § 351, Congress authorized the President to adjust judicial salaries every fourth year. He recommended that judicial salaries be increased 7.5 percent in each of the fiscal years 1974, 1975, and 1976, and these recommendations would have become effective but for Senate Resolution 293, which disapproved the President's recommendations on March 6, 1974, pursuant to 2 U.S.C. Section 359(1)(B). The action of the Senate was an unlawful and an unconstitutional exercise of Executive power reserved to the President by Article II, Section 1 of the Constitution. Furthermore, the Senate resolution did not constitute the enactment of legislation in accordance with the requirements of Article I, Sections 1 and 7 of the Constitution. The unconstitutional provision (2 U.S.C. § 359(1)(B)) is severable from the remainder of the act. Therefore, the salary adjustments recommended by the President became legally effective in March of 1974.

II

The Judicial Conference of the United States adopted the Code of Judicial Conduct of the American Bar Association with modifications approved April 6, 1973 and March 6, 1975. Canon 3C.(1)(c), as adopted by the Conference, provides:

> (1) A judge shall disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:
>
> (c) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or an other interest that could be substantially affected by the outcome of the proceeding;

By resolution of March 6, 1975, the Conference also provided that Canon 3D. should be stricken from the Code as adopted by the Conference so that a judge's disqualification on account of his financial interest may not be waived by agreement of the parties.

On December 5, 1974, Pub. L. 93-512 (88 Stat. 1609) was enacted. It provides as follows:

§ 455.

"(a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

"(b) He shall also disqualify himself in the following circumstances:

* * *

"(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

* * *

"(d)(4) 'financial interest' means ownership of a legal or equitable interest, however small, * * *

* * *

"(e) No justice, judge, magistrate, or referee in bankruptcy shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). * * *"

The judges of the Court of Claims are generally familiar with the "doctrine of necessity" which was invoked in *Evans* v. *Gore*, 253 245 (1920), and other cases. However, Pub. L. 93-512 is a strongly worded statute which was enacted long after *Evans* v. *Gore* was decided, and there is no indication in the legislative history that the "doctrine of necessity" excuses a Federal judge from disqualifying

himself where he is required to do so by Pub. L. 93-512. The judges of the Court of Claims are unanimously of the view that Pub. L. 93-512, taken literally, requires each of them to disqualify himself in these cases, because each has an interest in the subject matter of the controversy that could be substantially affected by the outcome of the proceeding. We are uncertain as to whether the pre-existing "doctrine of necessity" should be read into the statute as an implied exception. Therefore, before proceeding to hear and determine the claims in these cases, the judges feel that they need the guidance and advice of the Supreme Court. Accordingly, the court hereby certifies the following question and respectfully requests that the Supreme Court give appropriate instructions on this question and certify and transmit the same to the Court of Claims for its guidance in the disposition of these cases:

In view of the express provisions of Pub. L. 93-512 and the resolutions of the Judicial Conference as set forth above, are the judges of the Court of Claims required to disqualify themselves in these cases, or does the "doctrine of necessity" authorize and require the judges of the Court of Claims to hear and decide these cases?

/s/ Wilson Cowen
Wilson Cowen, Chief Judge
/s/ Oscar H. Davis
Oscar H. Davis, Judge
/s/ Byron G. Skelton
Byron G. Skelton, Judge
/s/ Philip Nichols, Jr.
Philip Nichols, Jr., Judge
/s/ Shiro Kashiwa
Shiro Kashiwa, Judge
/s/ Robert L. Kunzig
Robert L. Kunzig, Judge
/s/ Marion T. Bennett
Marion T. Bennett, Judge

I, Frank T. Peartree, Clerk of the United States Court of Claims, do hereby certify that the foregoing certificate in the cases of C. Clyde Atkins, et al. v. The United States, No. 41-76, and Louis C. Bechtle, et al., v. The United States, No. 132-76, was duly filed and entered of record in my office by order of said court, and as directed by said court, the said certificate is by me transmitted to the Supreme Court of the United States for its action thereon.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Court of Claims, at my office in Washington, D.C., this 27th day of May, A.D., 1976.

/s/ Frank T. Peartree
Clerk, United States Court of Claims